

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA**

DAVID N. MURPHY, SR.,

Plaintiff

v.

SCOTT M. GROCHOWSKI, *et al.*,

Defendants

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CIVIL ACTION NO. 3:18-1404

**(MANNION, D.J.)
(SCHWAB, M.J.)**

MEMORANDUM

I. BACKGROUND

Pending before the court is the January 7, 2020 report and recommendation, (Doc. 60), of Judge Susan E. Schwab recommending that defendant Gene Berdanier's motion to dismiss, or in the alternative, for summary judgment, (Doc. 27), be granted in part and, denied in part regarding the First Amendment retaliation claim remaining against him in this civil rights action under 42 U.S.C. §1983, filed *pro se* by plaintiff David N. Murphy, Sr. Also pending in this case are plaintiff's knock-and-announce claims against defendants Grochowski, Greenwald, Marrow, and John Does 1-3 which arose at the time of his arrest. Plaintiff is proceeding on his amended complaint. (Doc. 16). Defendants Grochowski, Greenwald, Marrow have filed answers with affirmative defenses to plaintiff's amended complaint.¹

¹The court notes that with respect to defendants John Does 1-3, to date they have not been identified by plaintiff and they have not been served with his amended complaint. "Doe defendants are routinely used as stand-ins for

After plaintiff's arrest, he was incarcerated at Schuylkill County Prison ("SCP") and, he alleges that since he had sued SCP in the past and threatened to sue SCP again, Berdanier retaliated against him by having him transferred to a different prison.

In her instant report, Judge Schwab finds that plaintiff's demand for a specific sum of damages, in his amended complaint, be stricken since it is in violation of Local Rule 8.1, M.D.Pa. Judge Schwab also recommends that Berdanier's motion, considered both as one to dismiss under Rule 12(b)(6) and as one for summary judgment under Rule 56, be denied, and that plaintiff's First Amendment retaliation claim against this defendant proceed.

To date, neither the plaintiff nor Berdanier have filed any objections to Judge Schwab's report and the time to do so has expired. In fact, after Judge Schwab issued her report, Berdanier filed his answer to plaintiff's amended complaint with affirmative defenses. (Doc. 61).

After having reviewed the record, the court will **ADOPT** the report and recommendation. Berdanier's motion will be **GRANTED IN PART** and

real parties until discovery permits the intended defendants to be installed; however, 'an action cannot be maintained solely against Doe defendants.'" Alvarez v. Ebbert, 2019 WL 2762964, *10 (M.D.Pa. July 2, 2019)(citing Hindes v. F.D.I.C., 137 F.3d 148, 155 (3d Cir. 1998)). Under Rule 4(m), since plaintiff's 90-day period has expired regarding service on John Does 1-3, the court is putting plaintiff on notice that he must identify his John Doe defendants if he wishes to proceed with his knock-and-announce claim against them in his amended complaint. If plaintiff fails to identify defendants John Does 1-3 after discovery is completed, they will be subject to dismissal pursuant to Rule 4(m). See *id.*

DENIED IN PART. This case will be remanded to Judge Schwab for further pre-trial proceedings as to the remaining claims.

II. STANDARD OF REVIEW

Where no objection is made to a report and recommendation, the court should, as a matter of good practice, "satisfy itself that there is no clear error on the face of the record in order to accept the recommendation." Fed.R.Civ.P. 72(b), advisory committee notes; see *also Univac Dental Co. v. Dentsply Intern., Inc.*, 702 F.Supp.2d 465, 469 (2010) (citing Henderson v. Carlson, 812 F.2d 874, 878 (3d Cir. 1987) (explaining judges should give some review to every Report and Recommendation)). Nevertheless, whether timely objections are made or not, the district court may accept, not accept or modify, in whole or in part, the findings or recommendations made by the magistrate judge. 28 U.S.C. §636(b)(1); Local Rule 72.31.

III. DISCUSSION

The court has reviewed the report and shall adopt Judge Schwab's conclusions with respect to the plaintiff's First Amendment claim against Berdanier.

IV. CONCLUSION

Accordingly, the report and recommendation of Judge Schwab is

ADOPTED IN ITS ENTIRETY. Berdanier's motion to dismiss is **GRANTED** with respect to plaintiff's demand for a specific sum of damages in his amended complaint and plaintiff's demand is **STRICKEN**. Berdanier's motion is **DENIED** with respect to plaintiff's retaliation claim against him. The court will remand this case to Judge Schwab for further proceedings as to the remaining claims and defendants. A separate order shall issue.

s/ Malachy E. Mannion
MALACHY E. MANNION
United States District Judge

Date: February 18, 2020

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